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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

ELMER L. BURGETT,

Plaintiff,

v.

MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., a Delaware corporation, CAL-  
WESTERN RECONVEYANCE  
CORPORATION, a California corporation,  
CAPITAL SECURITIES MORTGAGE, INC., a  
California corporation, and BENCHMARK  
MORTGAGE CORPORATION, INC., a  
California corporation, and NORTH  
AMERICAN SPECIALTY INSURANCE  
CORP, a New Hampshire Corporation,  
AURORA LOAN SERVICES LLC, a Delaware  
Limited Liability Company, and  
HOMECOMINGS FINANCIAL, a Delaware  
LLC

Defendants

No.

COMPLAINT FOR RESCISSION UNDER  
THE TRUTH IN LENDING ACT,  
VIOLATION OF THE OREGON  
MORTGAGE BROKER ACT,  
DECLARATORY RELIEF, AND BREACH  
OF CONTRACT

REQUEST FOR JURY TRIAL

Plaintiff for complaint against Defendants alleges as follows:

**1. INTRODUCTION**

This case involves the practice known as “PREDATORY LENDING.” Plaintiff

(hereinafter “Burgett”) is the owner of a home commonly referred to as 266 East Santiam

COMPLAINT FOR RESCISSION UNDER TILA, VIOLATION OF THE OREGON  
MORTGAGE BROKER ACT AND DECLARATORY RELIEF AND BREACH OF  
CONTRACT

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Street, Jefferson, Oregon and with a legal description set forth in Exhibit A attached hereto. Defendants, Benchmark Mortgage, Inc. (hereinafter "Benchmark"), Capital Securities Mortgage, Inc. (hereinafter "Capital") and First Magnus Financial Corporation (hereinafter Magnus") promised to refinance Burgett's home at an interest rate of Two and One Half percent (2.5%) for the purposes of lowering Burgett's monthly mortgage payments and helping improve Burgett's credit. Burgett was not given copies of his loan documents prior to closing and instead of the transaction closing at a title company or escrow, he was presented the documents at a restaurant. The terms of loan in the documents were materially different from those that were promised.

## 2. JURISDICTION

Jurisdiction is conferred upon this court by 15 U.S.C. §1640(a) and 28 U.S.C. §§1331 and 1367. Venue in this district is proper under 15 U.S.C. §1640(e).

## 3. PARTIES

3.1 Plaintiff is a resident of the State of Oregon who owns a home located in Marion County commonly known as 266 East Santiam Street, Jefferson, Oregon and with a legal description set forth in Exhibit A attached hereto.

3.2 On information and belief, Defendant Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") is a Delaware corporation claiming an interest in Burgett's home as either a nominee or beneficiary.

3.3 On information and belief, Defendant Cal-Western Reconveyance Corporation (hereinafter "Cal-Western") is a California corporation claiming an interest in Burgett's home as a Trustee and is, therefore, a necessary party under Oregon foreclosure law.

3.4 On information and belief, Defendant Magnus is a dissolved Arizona corporation.

3.5 On information and belief, Defendant Capital is a California corporation doing business in Oregon as an unregistered loan originator.

3.6 On information and belief, Defendant Benchmark is a California corporation formerly registered in Oregon as mortgage lender.

3.7 At all material times alleged herein, Defendant North American Specialty Insurance Corp. is a New Hampshire corporation doing business in Oregon as an Insurance Company and issuer of a Bond to Defendant, Benchmark, Surety NO. SUR2036503.

3.8 At all material times alleged herein Barry Higbee was an agent and/or employee of Capital Securities Mortgage, Inc., acting as a mortgage broker or originator in California and Oregon.

3.9 At all material times alleged herein, Scott Richards was an agent and/or employee of Benchmark Mortgage Company acting as a mortgage broker and/or loan originator in California and Oregon.

3.10 At all material times alleged herein Aurora Loan Services LLC is a Delaware Limited Liability Company doing business in Oregon a mortgage loan servicer. Aurora claims an interest in the property by way of some assignment or servicing agreement.

3.11 At all material times alleged herein Homecomings Financial LLC is a Delaware Limited Liability Company doing business in Oregon a mortgage loan servicer. Homecomings claims an interest in the property by way of some assignment or servicing agreement

#### **4. FACTUAL ALLEGATIONS**

4.1. At all material times alleged herein First Magnus, Capital, Benchmark, Higbee and Richards acted in concert and together in generating and funding a predatory loan to Burgett.

4.2. At all material times to this action, First Magnus regularly extended or offered to extend consumer credit for which a finance charge is or may be imposed or which, by written agreement, is payable in more than four installments, making it a creditor under TILA 15 USC §1602(f) and Regulation Z, 12 CFR §226.2(a)(17).

1           4.3     On or about February 2007, Defendant Capital, through Higbee , contacted  
2     Burgett and offered to help Burgett to refinance Burgett's home and to repair Burgett's  
3     credit. Capital promised Burgett a loan rate of two and one half percent (2.5%) and that  
4     through refinancing his property he would have a reduced monthly mortgage payment,  
5     thereby freeing up additional funds from his monthly income with which to pay his other bills  
6     and that it would make his credit better. Higbee told Burgett that he was a Christian and that  
7     he would work through Christ to take care of Burgett.

8           4.4     At all material times alleged herein, Burgett advised Defendants Capital,  
9     Benchmark and Magnus that he was on limited fixed income due to a disability.

10          4.5     On or about March 5, 2007, Burgett was met at restaurant by a notary public  
11     hired by the defendants. The notary presented Burgett documents to sign that were materially  
12     different from the loan promised to Burgett. There were two loans, one of which was for  
13     \$120,000 with a beginning adjustable interest rate of 7.5% instead of a 2.5% fixed rate as  
14     promised and disclosed to Burgett. The loan terms contained a negative amortization whereby  
15     if Burgett paid the minimum monthly payment the principal balance of the loan would  
16     increase daily and erode Burgett's equity in his home. If he paid the full amount of interest  
17     incurring on the loan, Burgett would spend more than 50% of his net monthly income without  
18     consideration for the 2nd mortgage to First Magnus. The other loan was for \$15,000 with a  
19     fixed interest rate of 12.375% and a minimum monthly payment of \$128. While at the  
20     restaurant, Burgett was given a copy of a new loan application that represented Burgett's  
21     income as \$4,200 per month rather than Burgett's \$1,371 disability income. While at the  
22     restaurant Plaintiff received a telephone call from Barry Higbee of Capital. When Burgett  
23     told Higbee that the loan documents were wrong, Higbee told Burgett that it was a mistake  
24     and that Burgett should sign them and that when they were returned the documents would be  
25     corrected.

26          4.6     Burgett relied on Magnus, Capital and Benchmark to treat him fairly and

1 to operate within the laws of the state of Oregon and in so doing Burgett executed the two  
2 notes and deeds of trust while at the restaurant.

3 4.7 Both Deeds of Trust recite that the Deed of Trust secures to Lender the  
4 repayment of the loan and also states that MERS is the Beneficiary solely as nominee of  
5 Lender.

6 4.8 The Deeds of Trust also recite that First Magnus is the Lender which under  
7 ORS 86.705 makes First Magnus the beneficiary.

8 4.9 MERS has recorded an appointment of Successor Trustee, purportedly signed  
9 by an Assistant Secretary of MERS in San Diego California and recorder on April 29, 2009 in  
10 the deed records for Marion County, Oregon. The appointment purports to appoint Cal-  
11 Western Reconveyance Corporation as Successor Trustee. On information and belief, the  
12 person who signed the appointment was not an officer of MERS or otherwise authorized to  
13 sign on its behalf.

14 4.10. On April 28, 2009, someone on behalf of Cal-Western executed a Notice of  
15 Default and Election to Sell which was recorded in the Marion County Deed Records on  
16 April 29, 2009. The Notice of Sale and Election to sell purports to nonjudicially foreclose  
17 Burgett's home pursuant to the 1<sup>st</sup> Deed of Trust.

18 4.11 On April 28, 2009, someone on behalf of Cal-Western issued a Notice of Sale  
19 to the effect that Cal-Western intended to sell Burgett's home on September 3, 2009 in a  
20 Trustee's Sale. The Notice of Sale was served on Burgett a few days after April 28, 2009.

21 4.12 On information and belief there have been transfers of the beneficial interest in  
22 the 1st Deed of Trust that have not been recorded.

23 FIRST CLAIM FOR RELIEF  
24 (Truth in Lending Act-Rescission)

25 5.1 Plaintiff realleges and incorporates by reference Paragraphs 1-4.12 above.

26 5.2 Burgett was not given the disclosures required under Regulation Z, 12 CFR  
§226.17 thereby extending Burgett's right to rescind the loans under TILA, pursuant to 15

1 USC § 1635(a) and 1640(a) entitling Burgett to a (1) return of any money or property given  
 2 by Plaintiff to anyone in connection with this transaction, including all loan fees and costs  
 3 paid in connection with the loan and all payments made by Plaintiff.

4 5.3 Burgett timely gave Aurora, Homecomings and First Magnus a Notice of  
 5 Cancellation and Rescission for both the 1<sup>st</sup> and 2nd mortgages.

6 5.4 The Defendants, Aurora, Homecomings and First Magnus, have failed and  
 7 refused to rescind the loan transaction.

8 5.5 Plaintiff is entitled to recover statutory damages and his reasonable attorney  
 9 fees incurred in bringing this claim.

## 10 SECOND CLAIM FOR RELIEF

11 (Against Defendants Benchmark Mortgage Corporation, Inc., Capital Securities Mortgage  
 12 and North American Specialty Insurance Corp for violation of ORS § 59.840 et seq)

13 6.1 Plaintiff realleges and incorporates by reference Paragraphs 1-4.12 above.

14 6.2 Defendants Benchmark and Capital have transacted business as mortgage  
 15 bankers or mortgage brokers through the employment of a scheme and by means of an untrue  
 16 statement of a material fact or an omission to state a material fact necessary in order to make  
 17 the statements made, in light of the circumstances under which they are made, not misleading,  
 18 in violation of ORS 59.925(b) and ORS 59.930.

19 6.3 As a result of Defendants' violation of ORS 59.925(b) and 59.930, Plaintiff has  
 20 suffered financial loss under the terms of the new loan in the form of more than \$5,000 in  
 21 closing costs and fees to Defendants and additional interest due or that shall become due  
 22 under the terms of the loan.

23 6.4 Plaintiff is entitled to recover his reasonable attorney fees herein pursuant to  
 24 ORS 59.925(8).

THIRD CLAIM FOR RELIEF

DECLARATORY RELIEF

(Against ALL Defendants)

7.1 Plaintiff realleges Paragraphs 1-4.12 above.

7.2 Plaintiff contends that the scheduled foreclosure sale for September 3, 2009 is invalid and contrary to Oregon law on the following grounds:

1. The mortgage is not a Deed of Trust in compliance with ORS 86.705 - 86.795 and may not be foreclosed by a non-judicial foreclosure because it purports to name MERS as a beneficiary in addition to the lender who was the facial and factual beneficiary under the loan secured by the mortgage.

2. Cal-Western is not entitled to foreclose the Deed of Trust and lacked the authority to record the Notice of Default because its appointment as successor trustee is invalid. It is invalid because:

a. The party signing for MERS lacked authority to do so;

b. The Notice of Default and the Notice of Sale were executed prior to the recording of the Appointment of successor trustee;

3. Cal-Western is not entitled to foreclose because the Notice of Default and Election to Sell failed to set forth the true name and address of the beneficiary under the Deed of Trust as required by ORS 86.740 and 86.745.

4. On information and belief, Cal-Western is not entitled to foreclose the Deed of Trust because all of the assignments of the beneficial interest in the Deed of Trust were not recorded before the recording of the Notice of Default as required under ORS 86.735.

5. On information and belief Cal-Western is not entitled to foreclose the Deed of Trust because MERS was not the holder of the Note and Deed of Trust at the time that the election to sell the property was recorded.

6. Cal-Western is not entitled to foreclose because Burgett has elected to rescind the loan.

7.3 On information and belief, Defendants deny Plaintiff's contentions.

7.4 A judicable controversy exists and the court should determine the rights of the parties.

7.5 Plaintiff lacks an adequate remedy at law and the court should issue a temporary and preliminary injunction against Defendants and those acting through them from taking any action to interfere with Plaintiff's right of possession of his property.

#### FOURTH CLAIM FOR RELIEF

(Breach of Contract)

(Against MERS and Cal-Western)

8.1 Plaintiff realleges Paragraphs 1-4.12 above and 7.1-7.5 above.

8.2 MERS and Cal-Western have breached their contract with Burgett by attempting to foreclose the property in violation of the Oregon Trust Deed Act.

8.3 Plaintiff is entitled to recover his reasonable attorney fees incurred in stopping the foreclosure pursuant to the terms of the Deed of Trust and ORS 20.096.

#### FIFTH CLAIM FOR RELIEF

(Violation of RESPA 12 USC Section 2605(e))

9.1 Plaintiff realleges paragraphs 1-4.12 above and 7.1-7.5 above

9.2 On or about December 3, 2008 Plaintiff served a Qualified Written Request to Aurora for information relating to the 1<sup>st</sup> Mortgage. Aurora failed to serve a timely and/or a complete response on Plaintiff.

9.3 As a result of Aurora's failure to respond, Plaintiff has suffered emotional distress in an amount to be determined at trial. Plaintiff is further entitled to recover \$1,000 statutory damage and his reasonable attorney fees incurred herein.

**Plaintiff demands a jury trial.**



1 WHEREFORE, Plaintiff prays for a judgment as follows:

2 1. Declaring that the pending foreclosure of Plaintiff's property is invalid and  
3 providing Plaintiff with a temporary and preliminary injunction enjoining Defendants,  
4 and each of them, from taking any acts to take possession of Plaintiff's property during  
5 the pendency of this action and such other equitable relief that the Court deems  
6 necessary;

7 2. Declaring that Plaintiff has properly executed his Notice of Cancellation  
8 and that he is entitled to his remedy of rescission;

9 3. Awarding Plaintiff a judgment against Defendants Benchmark and  
10 Capital on Plaintiff's Chapter 59 claim in the amount of to be proven at trial in  
11 damages, plus an additional amount in reasonable attorney fees incurred to stop  
12 Defendants from taking possession of the property;

13 4. Awarding Plaintiff statutory damages against Aurora and Homecomings  
14 on Plaintiff's rescission claim.

15 5. Awarding Plaintiff statutory damages against Auroa on Plaintiff's RESPA  
16 claim together with Plaintiff's attorney fees.

17 6. Granting Plaintiff's rescission and relief as allowed under TILA and  
18 allowing Plaintiff to offset any damages awarded in this action;

19 7. Determining the amount to be tendered by Plaintiff in rescission;

20 8. Awarding Plaintiff's costs and attorney fees incurred herein;

21 9. Such other equitable relief that may be proper.

22  
23 Dated this \_\_\_\_ day of September, 2009.

24  
25  
26 \_\_\_\_\_  
Terrance J. Slominski, OSB 81376  
Attorney for Plaintiff

## **EXHIBIT A**

BEGINNING AT A IRON PIPE 140.00 FEET NORTH  $89^{\circ} 59' 40''$  WEST FROM THE NORTHEAST CORNER OF BLOCK 4, INSTITUTE ADDITION TO THE CITY OF JEFFERSON, MARION COUNTY, OREGON; THENCE SOUTH  $0^{\circ} 11' 06''$  WEST 105.10 FEET TO AN IRON PIPE; THENCE SOUTH  $89^{\circ} 59' 40''$  EAST 70.19 FEET; THENCE NORTH  $0^{\circ} 05' 33''$  EAST 105.10 FEET TO THE NORTH LINE OF SAID BLOCK 4; THENCE NORTH  $89^{\circ} 59' 40''$  WEST 70.00 FEET TO THE PLACE OF BEGINNING.